STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **RIFTON ENTERPRISES, LLC** for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1997 through August 31, 1997.	ORDER DTA NO. 818419

Petitioner, Rifton Enterprises, LLC, 10 Hellbrook Lane, Ulster Park, New York 12487, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1997 through August 31, 1997.

On September 5, 2001, petitioner, by its representative, Urbach Kahn & Werlin Advisors, Inc. (David L. Evans, CPA) filed a motion for an order granting summary determination to petitioner pursuant to section 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal on the ground that there exists no material and triable issue of fact. The Division of Taxation, appearing by its representative, Barbara G. Billet, Esq. (Michael P. McKinley, Esq., of counsel) filed a response to the motion seeking denial of petitioner's motion on the ground that there are material issues of fact or justiciable matters at issue and also filed a cross motion for summary determination seeking dismissal of the petition and affirmance of the Division of Taxation's denial of petitioner's refund claim. The Division of Taxation's response and cross motion were filed on October 5, 2001, which date commenced the 90-day period for the issuance of this order. Based upon the motion papers and documents submitted therewith, the response by the Division of Taxation and exhibits attached thereto and all the pleadings and

documents submitted in connection with this matter, Brian L. Friedman, Administrative Law Judge, renders the following order.

ISSUE

Whether, pursuant to Tax Law § 1115(a)(21), petitioner's claim for refund of use tax paid on its purchase of a fuel tank should be granted.

FINDINGS OF FACT

1. Rifton Enterprises, LLC ("petitioner") is a fixed base operator located at Stewart International Airport in Newburgh, New York. Petitioner performs a variety of services including the selling of fuel to commercial airlines.

2. In 1997, petitioner purchased a 20,000 gallon fuel tank for the sum of $80,868.15 from International Tank, Inc. of Kansas City, Kansas. No sales tax was paid on the purchase of this fuel tank.

The purchase of the fuel tank was reported as a taxable purchase on petitioner's sales and use tax returns for the quarters ended May 31, 1997 and August 31, 1997. Use tax in the amount of $5,862.94 was paid upon the filing of the returns.

3. On February 18, 2000, the Division of Taxation ("Division") received from petitioner an application for credit or refund of sales and use tax in the amount of $5,862.94. In an attachment to the application for credit or refund, petitioner stated:

> Section 1115(a)(21) exempts from New York sales and use tax the purchase of 'commercial aircraft primarily engaged in intrastate, interstate or foreign commerce, machinery or equipment to be installed on such aircraft, *and property used by or purchased for the use of such aircraft for maintenance and repairs* . . . .' Technical Services Bureau Memo TSB-M-80(4)S itemizes those purchases that qualify for exemption, specifically exempting 'fuel, fueling and defueling, oil, grease and other supplies.'

4. On April 17, 2000, the Division denied petitioner's claim for refund in full. The denial

letter stated, in part, as follows:

> The exemption for maintenance services to aircraft can be tax exempt as described in TSB-M-80(4)S to which you refer to support your refund claim. However, the exemption applies to commercial aircraft primarily engaged in intrastate, interstate, or foreign commerce. It does not apply to operators providing maintenance services to airlines.

SUMMARY OF THE PARTIES' POSITIONS

5. Petitioner asserts the following:

a. Tax Law § 1115(a)(21) exempts machinery or equipment to be installed on commercial aircraft and property used by or purchased for the use of such aircraft for maintenance and repairs.

b. The fuel tank at issue in this matter is included in this exemption because it was purchased and used for the maintenance of commercial aircraft. TSB-M-80(4)S exempts machinery and equipment used for or on commercial aircraft. This memorandum interprets the exemption by explaining that *use* of the equipment or machinery is the dispositive factor, not whether the equipment or machinery is owned by the commercial aircraft. Therefore, petitioner need not be a commercial airline or the owner of a commercial aircraft to be entitled to the exemption.

c. There are no facts in dispute and, accordingly, this matter can be resolved solely, in petitioner's favor, by means of statutory construction.

6. The position of the Division is as follows:

a. Petitioner sells fuel. Its fuel tank is used to store fuel before it is sold; therefore, the fuel tank is used in the sale of tangible personal property.

b. The sale of fuel to an airline is not a maintenance service. Therefore, the fuel tank is not being used to maintain or service aircraft.

c. There are a number of material facts at issue which require a fact-finding hearing at which petitioner must offer proof to be entitled to the tax exemption claimed, such as:

(1) proof that airlines store fuel in petitioner's tank;

(2) proof that the fuel tank services commercial airlines and if so proven, evidence as to what percentage was provided to commercial aircraft;

(3) proof that its employees fuel commercial aircraft (in lieu of merely transferring the fuel to fuel trucks owned by airlines); and

(4) proof that petitioner charges a fee for the fueling of aircraft in addition to the charge for the sale of the fuel;

d. Tax Law § 1115(a)(9) exempts from tax the fuel sold to airlines. The Division's regulations (20 NYCRR 528.10[c][1][i], [ii]) draw a distinction between the charges related to the sale of fuel (the sale of tangible personal property) and the charges for delivering fuel owned by an airline to its aircraft (the sale of a maintenance service).

e. Even if it is determined that petitioner provides a maintenance service by pumping fuel into commercial aircraft, the nexus between petitioner's storage tank and this service is so distant that the tank cannot be deemed to be used to maintain the aircraft.

CONCLUSIONS OF LAW

A. Any party appearing before the Division of Tax Appeals may bring a motion for summary determination as follows:

> Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, shall recite all material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. (20 NYCRR 3000.9[b][1]; ***see also***, Tax Law § 2006[6].)

In reviewing a motion for summary determination, an administrative law judge is initially

guided by the following regulation:

> The motion shall be granted if, upon all papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact. (20 NYCRR 3000.9[b][1]; ***see also***, Tax Law § 2006[6].)

A party moving for summary determination must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Such a showing can be made by "tendering sufficient evidence to eliminate any material issue of fact from the case" (***Winegrad v. New York University Medical Center*** , 64 NY2d 851, 487 NYS2d 316, 317, ***citing Zuckerman v. City of New York*** , 49 NY2d 557, 562, 427 NYS2d 595). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*** , 22 NY2d 439, 293 NYS2d 93, 94; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion ***(see, Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

C. Clearly, there are a number of material facts in dispute in this matter which require the tendering of evidence. While, as petitioner correctly asserts, this is a matter of statutory construction, such construction cannot be performed until a number of factual issues are resolved. As the Division points out, proof must be offered as to, among other things, the uses of the fuel tank, the destination of the fuel and the manner of its transport, and the breakdown of

fees charged by petitioner. Only after these and certain other facts are proven can a determination be made as to whether this petitioner is entitled to the exemption claimed.

D. The motion of Rifton Enterprises, LLC for summary determination is denied; the Division of Taxation's cross motion for summary determination is denied; and this matter shall be scheduled for a hearing in due course.

DATED: Troy, New York
October 25, 2001

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE